STATE OF IOWA
DEPARTMENT OF COMMERCE
IOWA UTILITIES BOARD

IN RE: SUMMIT CARBON SOLUTIONS, LLC	**DOCKET NO. HLP-2021-0001** **REPLY BRIEF ON BEHALF OF WOLF CARBON SOLUTIONS US, LLC REGARDING FEDERAL PREEMPTION MATTERS**

COMES NOW, Wolf Carbon Solutions US, LLC ("WCS") with this Reply Brief (this "Reply") regarding matters pertaining to federal preemption issues between the regulatory jurisdictions of the Iowa Utilities Board (the "IUB") and the federal Pipeline and Hazardous Materials Safety Administration ("PHMSA"), pursuant to that certain IUB Order issued on November 22, 2022 (the "Order"):

1. As an initial matter, WCS joins in support of Summit Carbon Solutions, LLC's ("Summit") arguments presented in its own reply filing, as well as the arguments presented in Navigator Heartland Greenway LLC's ("Navigator") own reply filing in this docket.

2. WCS writes separately to submit additional arguments in support of the position that the requested information in question — an emergency response plan ("ERP"), a risk assessment, and a discharge plume model — should not be required as a condition precedent to the granting of a permit for the construction of a hazardous liquid pipeline due to federal preemption matters and other concerns.

I. FEDERAL PREEMPTION APPLIES HERE.

3. It cannot be seriously contended by those opposed to hazardous liquid pipelines in Iowa that an express preemption clause doesn't exist that would apply to this docket and others like it regarding safety issues. *See* 49 U.S.C. § 60104(c). *See also* Farm Bureau Br., at p. 5 (Filed

Nov. 10, 2022); OCA Br., at p. 5 (Filed Nov. 10, 2022); Sierra Club Br., at p. 3 (Filed Nov. 10, 2022). This provision reads in no uncertain terms: "A state authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation." 49 U.S.C. § 60104(c). Governing case law is similarly clear that this preemption clause indicates that the federal government — not any state regulatory body — may not occupy any regulatory space regarding safety-related matters touching upon interstate hazardous liquid pipelines. *See, e.g., Northern Nat. Gas Co. v. IA Utils. Bd*., 377 F.3d 817, 821-23 (8th Cir. 2004); *Kinley Corp. v. IA Utils. Bd*., 999, F.2d 354, 358-59 (8th Cir. 1993); *ANR Pipeline Co. v. IA State Commerce Comm'n*, 828 F.2d 465, 466-70 (8th Cir. 1987).

4. Faced with this express preemption clause issue, OCA, Farm Bureau, and Sierra Club attempt to pivot to an alternate reading of the statutory scheme in question. That is, from the OCA, Farm Bureau, and Sierra Club's perspective, ERPs, risk assessments, and discharge plume models are not actually "safety" issues, but are instead understood to be part and parcel of "siting and routing" determinations within the purview of the IUB. *See* OCA Br., at pp. 6-7 (Filed Nov. 10, 2022); Farm Bureau Br., at pp. 5-6 (Filed Nov. 10, 2022); Sierra Club Br., at pp. 3, 15-27 (Filed Nov. 10, 2022).

5. WCS has not, and does not, dispute that siting and routing determinations are inside the ambit of the IUB's power. *See* 49 U.S.C. § 60104(e) ("This chapter does not authorize the Secretary of Transportation to prescribe the location or routing of a pipeline facility."). On this point, WCS agrees with the opposition. *See, e.g.*, Farm Bureau Br., at p. 15 (Filed Nov. 10, 2022) ("Routing is not covered by PHMSA and is a topic left exclusively to the primary jurisdiction of the state."). But the key question is not whether the IUB may make siting and routing decisions, as the opposition suggests, ***but whether safety related items such as ERPs, risk assessments, and***

discharge plume models <u>specifically</u> are necessary and integral to such decisions in light of serious federal preemption concerns. The answer is they are not. This is where WCS and the opposition disagree. *See* Farm Bureau Br., at p. 15 (Filed Nov. 10, 2022) (asserting, without basis or citation, that "the Board is not attempting to utilize this information to substantively regulate safety standards for the pipeline…").

6. To illustrate the issue presented, a hypothetical is in order. Say the ERP, risk assessment, and discharge plume models are required to be submitted. Posit further that, based upon the submission and analysis of that information, the IUB decides that such information is the sole determinative factor in its siting and routing decisions for a pipeline. This would essentially be akin to the IUB skirting federal law by creating a *de facto* "safety standard" because the judging of a pipeline's safety-related operational capabilities and plans would make the ultimate difference in a state-level agency's ruling regarding siting and routing. That type of decision-making process would otherwise be off limits to the IUB due to federal preemption. *See* 49 U.S.C. § 60104(c).

7. Alternatively, posit further that the ERP, risk assessment, and discharge plume model are compelled to be filed and are simply considered as only "a factor" in the siting and routing analysis, but are not determinative standing alone. In this hypothetical scenario, "safety standards" are still being considered where they should not be in the siting and routing calculous — in this instance, those documents still don't belong. If such safety-related information is not, in fact, determinative, one would question the wisdom and utility of requiring its filing at all. If that information does not make a material difference in the IUB's decision-making process, then a reasonable observer could rest assured that the IUB can make an educated siting and routing decision without that information in the first place, particularly so when such information will already have to be filed, or will be filed, with the federal regulators in any event. *See* 49 U.S.C. §

60104(c). *See also* 49 C.F.R. § 195.402(e) (ERP information required as part of PHMSA rules); 87 FED. REG. 20940 and 20978 (published Apr. 8, 2022) (PHMSA rulemaking for hazardous liquid pipelines).

8. Federal law already indicates that "safety standard" information includes "the design, installation, inspection, ***emergency plans and procedures***, testing, construction, extension, operation, replacement, and maintenance of pipeline facilities." 49 U.S.C. § 60102(a)(2)(B) (emphasis added). *See also* 49 C.F.R. § 195.402 (stating safety-related information includes, but is not limited to, ERPs and similar materials for hazardous liquid pipelines). This is the terrain of the federal government, not that of the IUB. *See* 49 U.S.C. § 60104(c). *See also United States v. Grimes*, 641 F.2d 96, 103 (3d Cir. 1981) ("Normally, in areas where the federal government is given power to act, its authority, although limited in scope is paramount. Thus, in…matters under its control, the federal government can fully preempt the states.").

9. To stake out the position, as apparently OCA, Farm Bureau, and Sierra Club have, that ERPs, risk assessments, and discharge plume models are not essential and natural elements of "emergency plans and procedures" strains the bounds of reality in the general utility regulatory space and in the pipeline business. *See*, *e.g.*, *BNSF Ry. Co. v. Swanson*, 533 F.3d 618, 622 (8th Cir. 2008) (finding a district court read the preemption language in a federal statute too narrowly); *Mealy v. Nash Finch Co.*, Case No. 13-0635, 2014 WL 468007, at *5 (Iowa Ct. App. Feb. 5, 2014) (holding a lower court read the statute too narrowly and without realistic context).[1]

[1] Curiously, on page 11 of its Brief, Farm Bureau asserts that Summit is taking an "overly broad interpretation" of what "safety standards" means for federal preemption purposes. *See* Farm Bureau Br. at p. 11 (Filed Nov. 10, 2022). WCS disagrees with this position based upon the language of the federal statutes and regulations. *See* 49 U.S.C. §§ 60102(a)(2)(B); and 60104(c). WCS counters that Farm Bureau is taking an "overly broad interpretation" of what "siting and routing" is in order to obtain otherwise unobtainable information under disguised pretenses. It is not that the definition of "safety standard" is read too broadly by Summit — indeed, Farm Bureau

10. Each of the three requested documents are interconnected with one another on purely safety-related grounds. For example, one could not develop an effective ERP without first developing a risk assessment of potential vulnerabilities. Likewise, an effective risk assessment would need to rely on discharge plume model. Moreover, a discharge plume model would be integral to developing an effective ERP. Put simply, each of these three requested pieces of information are inherently components of a "safety standard" framework and are inseparable from one another. And where multiple elements of a common scheme "are so correlative, one cannot exist without the other," the materials are indivisible. *See generally Coburn v. City of Tucson*, 691 P.2d 1078, 1080 (Ariz. 1984) (*en banc*). *See also* 49 U.S.C. § 60102(a)(2)(B) (defining "safety standards" to include "emergency plans and procedures."). *Cf. Bailey Travel Corp. v. Gen. Cas. Co. of Wisconsin*, Case No. 00-1130, 2001 WL 71031, at *3 (Iowa Ct. App. Jun. 13, 2001) ("Therefore, when the term 'voluntary' is appropriately interpreted [in a statute], not in isolation but in the context in which it appears, it cannot have the meaning found possible by the trial court, a meaning which would engender ambiguity…").

11. The IUB should follow the lead of other jurisdictions that have aptly noted that the field of safety matters and considerations regarding interstate pipeline projects belongs exclusively to the federal government, not local authorities. *See, e.g., Olympic Pipeline Co. v. City of Seattle*, 437 F.3d 872, 877-80 (9th Cir. 2006) (Pipeline Safety Act and Hazardous Liquid Safety Act

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reads it too ***narrowly*** — but what is required for siting and routing decisions by the IUB is being read conversely too broadly by Farm Bureau. *See Mathis v. IA Utils. Bd.*, 934 N.W.2d 423, 427-28 (Iowa 2019) (noting the IUB's "narrow" authority to interpret certain legal definitions and parameters). *See also Kington Hosp. v. Sebelius*, 828 F.Supp.2d 473, 480 n.12 (N.D.N.Y. 2011) (noting an "interpretation is flawed…likely for being too broad, not too narrow."). Either the "scope [of a statute] is too broad or it is not, but one cannot be saved by carving non-specialty areas out of the prohibited lines" in question. *See generally Bed Mart, Inc. v. Kelley*, 45 P.3d 1219, 1222 (Ariz. Ct. App. 2022).

preempted a city from enforcing additional safety restrictions and requirements); *Washington Gas Light Co. v. Prince George's Cnty. Council*, 711 F.3d 412, 420 (4th Cir.) ("The [Pipeline Safety Act's] text, its legislative history, administrative implementation, and judicial interpretation, attest to the federal preemption of the field of safety with respect to the establishment and enforcement of standards regulating the interstate transmission of gas by pipeline."); *Colorado Interstate Gas Co. v. Wright*, 707 F.Supp.2d 1169, 1187 (D. Kan. 2010) ("Courts have construed the statutory text and legislative history behind the [federal pipeline safety acts] as leaving no room for state regulation of interstate pipeline safety issues."); *Northern Border Pipeline Co. v. Jackson Cnty., Minn.*, 512 F. Supp. 1261, 1265 (D. Minn. 1981) (rejecting the notion that "gas safety matters are primarily of local concern and subject to regulation by the States."). *Accord IBP, Inc. v. IA Employment Appeal Bd.*, 604 N.W.2d 307, 314-15 (Iowa 1999) (holding emergency response plans in the context of OSHA regulations were a federal, not state matter).

II. "PUBLIC CONVENIENCE AND NECESSITY" DETERMINATIONS DO NOT REQUIRE THE REQUESTED INFORMATION.

12. OCA, Farm Bureau, and Sierra Club also make arguments that suggest the disclosure of the ERP, risk assessment, and discharge plume model is required before a determination may be made regarding the "public convenience and necessity" of granting Summit's pipeline application. *See* OCA Br., at pp. 2-3 (Filed Nov. 10, 2022); Farm Bureau Br., at pp. 10-11 (Filed Nov. 10, 2022); Sierra Club Br. at p. 40 (Filed Nov. 10, 2022).

13. There is no firm nor settled explicit statutory definition of what is or is not "public convenience or necessity" in IOWA CODE § 479B.9. *See In re Heartland Pipeline Co.*, 1999 WL 35236260, at *5 (Jan. 29, 1999) ("'public convenience and necessity' is nowhere specifically defined" in IOWA CODE § 479B.9). However, clues may be drawn from variety of authorities that might provide some insight. *See State v. Winters*, Case No. 10-1197, 2012 WL 3027131, at *1

(Iowa Ct. App. Jul. 25, 2012) ("When the Legislature has not defined words used in a statute, we must determine as best we can the meaning of the language in accordance with the legislative intent so as to prevent absurdities and incongruities…").

14. For starters, one should look to the text of the statutory provision itself. *See Baumhoefener Nursery, Inc. v. A&D Partnership, II*, 618 N.W.2d 363, 367 (Iowa 2000) (legislative "intent is best demonstrated by the words used the statute."). IOWA CODE § 479B.9 alone speaks only to the granting of a permit "in whole or in part upon terms, conditions, and restrictions ***as to location and route***…" IOWA CODE § 479B.9 (emphasis added). It does not make any textual indication that location and routing decisions would involve considerations of safety standards or other safety-related matters. *See id*.

15. Because we read separate provisions of a Code chapter together to divine intent, *see, e.g., State v. Billings*, 242 N.W.2d 726, 731 (Iowa 1976) ("we consider related provisions together and attempt to harmonize them if possible when searching for legislative intent…"), a glance at IOWA CODE § 479B.1, the Chapter's preamble and "purpose" provision, is helpful. It reads: "It is the purpose of the general assembly in enacting this law to grant the utilities board the authority to implement certain controls over hazardous liquid pipelines to protect landowners and tenants from ***environmental or economic damages***…to approve ***location and route*** of hazardous liquid pipelines, and the ***grant rights of eminent domain*** where necessary." IOWA CODE § 479B.1 (emphasis added). Again, there is no mention of considerations of safety standards or safety-related information.[2]

[2] The only statutory reference to "safety" in Iowa Code Chapter 479B is in IOWA CODE § 479B.23, but that provision simply authorizes the IUB to enter into agreements and receive federal funding under joint agreements for the inspection of already constructed pipelines. That provision has nothing to do with the consideration of safety-related information for a pipeline pre-

16. Opponents of the pipelines cite to the Dakota Access IUB docket and *Puntenney* case as justification to plug the hole of otherwise unavailable authority for their positions. *See* OCA Br., at pp. 4-5 (Filed Nov. 10, 2022); Farm Bureau Br., at pp. 17-18 (Filed Nov. 10, 2022); Sierra Club Br. at pp. 12, and 29 (Filed Nov. 10, 2022). *See also Puntenneny v. IA Utils. Bd.*, 928 N.W.2d 829 (Iowa 2019); *In re Dakota Access, LLC*, Dkt. No. HLP-2014-0001, 2016 WL 946929, at *6 (Iowa U.B. Mar. 10, 2016). This reliance is misplaced.

17. In *Dakota Access*, the "safety" considerations were primarily focused on the safety of transporting crude oil via pipeline versus via rail. *See In re Dakota Access, LLC*, Dkt. No. HLP-2014-0001, 2016 WL 946929, at *6, 13-16 (Iowa U.B. Mar. 10, 2016). To the extent the IUB "agreed" with the Sierra Club in that action that other safety considerations were not preempted, it dealt with an eminent domain process, not an initial permitting process. *See id*. at *26-28. Notably, eminent domain is not at stake here.

18. Further, the Court in *Puntenney* recognized that the words "convenience" and "necessity" are similar, but not inherently identical. *See Puntenneny*, 928 N.W.2d at 840-41 ("'convenience' is much broader and more inclusive than the word 'necessity.'") (quoting *Thomson v. IA State Commerce Comm'n*, 15 N.W.2d 603, 606 (1944)). A reasonable corollary to this would be that the phrases "safety standards" are similar to, but not identical to, "siting and routing" with respect to pipelines. As such, they should not be treated all together as the opponents of the pipeline suggest. *See, e.g., Bartlett & Co. Grain v. Bd. of Review of City of Sioux City*, 253 N.W.2d 86, 93 (Iowa 1977) ("Similar does not mean identical, but having resemblance; and property may

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constitution and absent a state/federal agreement. As a result, this statutory provision is less than useful for the question presented before the IUB at this time.

be similar in the sense in which the word is used here though each possess points of difference.") (citations and marks omitted).

III. ADDITIONAL REPLY POINTS.

19. Sierra Club states the IUB has "the dubious honor of setting [pipeline regulation] precedent. It is important to do it right, rather than do it quickly." Sierra Club Br., at p. 3 (Filed Nov. 22, 2022). WCS agrees that reaching the correct result is optimal over timing — but the "honor" to do so by the IUB is not "dubious." The IUB is a thoughtful and sophisticated entity more than capable to making consequential decisions. Nonetheless, this argument by Sierra Club raises the question of whether or not Sierra Club wants the IUB to have ***more*** information in the form of briefing, rather than ***less***, ahead of a future oral argument on the above-captioned matter. *Accord Sullivan v. Saint-Gobain Performance Plastics Corp*., Case No. 5:16-cv-125, 2020 WL 9762421, at *5 (D. Vt. Nov. 4, 2020) ("The court favors more information rather than less…"). It seems that Sierra Club is advocating for less information prior to any oral argument, rather than more. That, in the words of OCA's briefing, shows that Sierra Club "has the issue backwards." *See* OCA Br., at p. 10 (Filed Nov. 10, 2022).

20. Additionally, it is peculiar that neither OCA, Farm Bureau, nor Sierra Club address the arguments raised by WCS in its initial filing regarding the risk of unlawful disclosure of proprietary and critical safety infrastructure information that may attend to the public filing of the requested information. *See* IOWA CODE §§ 22.7(3); 22.7(6); 22.7(18); 22.7(50); 22.7(71); and Iowa Code Chapter 550. While mandatory simultaneous filing before the IUB may account for this, these issues remain serious concerns that have not yet been raised or addressed in this action. In any event, they should remain paramount concerns for the IUB in this docket moving forward. *See* WCS Br. at pp. 22-26 (Filed Nov. 10, 2022).

IV. CONCLUSION.

21. For the foregoing reasons, WCS respectfully requests that the demand for the requested information be denied.

22. Lastly, WCS incorporates by reference all arguments and citations to authority contained in its initial briefing previously submitted in this matter as if fully set forth herein.

Dated: November 30, 2022

Respectfully submitted,

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